



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Tango Construction, Inc.; Neal & Company, Inc.

**File:** B-244599; B-244599.2

**Date:** November 4, 1991

Stephen J. Crispen, Esq., Wade & De Young, for the protester.  
Linda A. Leonard, Esq., United States Coast Guard, Department of Transportation, for the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. The General Accounting Office will consider a protest of a procurement of punch list items for the account of a construction contractor under the inspection clause, notwithstanding a pending claim by the contractor in the United States Claims Court concerning the propriety of the withholding of moneys for the punch list work and the propriety of the agency's exercise of its rights under the inspection clause.
2. Construction contractor's protest that agency improperly failed to solicit it for punch list work under a solicitation issued, for the contractor's account, pursuant to the inspection clause is denied, where the record indicates that the contractor evidenced to the agency no interest in performing or submitting a proposal for the work.
3. Protest by an affiliate of a construction contractor of the agency's failure to solicit it for the procurement, for the contractor's account, of punch list work under the inspection clause is sustained, where the affiliate expressly requested the solicitation and an opportunity to compete, and the agency has provided no legitimate reason why the affiliate should not have been permitted to compete.

### DECISION

Tango Construction, Inc. and Neal & Company, Inc. protest their exclusion from a procurement under request for proposals (RFP) No. DTCG50-91-R-643418, issued by the United States Coast Guard for completion of punch list items remaining from contract No. DTCG50-88-C-67003, Lake Louise

Family Housing Phases VII and VIII.<sup>1</sup> The procurement was conducted pursuant to the inspection of construction clause of the contract.

We sustain Tango's protest and deny Neal's protest.

Neal was the contractor for the Lake Louise project. Tango and Neal reportedly share common officers, physical facilities, and legal counsel; however, these firms apparently do not have common ownership. This solicitation was issued to complete certain work that the Coast Guard asserts was not completed under Neal's contract. The Coast Guard issued the solicitation for the account of Neal to three on-site contractors. Although two offers were submitted by the July 1, 1991, closing date, no award has been made.

The agency refused to allow either Tango or Neal to compete for the work, even though Tango expressly requested the solicitation and an opportunity to submit a proposal in the middle of June. On June 26, both firms protested the Coast Guard's failure to solicit offers from them.

The Coast Guard argues that the protests should be dismissed because the same issues are before a court of competent jurisdiction. In this regard, on June 6 Neal filed a complaint in the United States Claims Court (Docket No. 91-12030) that, among other things, puts at issue the propriety of the Coast Guard's withholding of funds otherwise due under Neal's contract for various punch list work included in the RFP under protest.

The issues properly before the Claims Court--the propriety of the Coast Guard's exercise of its rights under the inspection clause and withholding of funds from Neal's contract--are not within our bid protest jurisdiction because they involve matters of contract administration. See 4 C.F.R. § 21.3(m)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). The issues before us, however, relate to the conduct of the procurement for completion of the punch list items; these issues are not part of the pending Claims Court action. See Hemet Valley Flying Serv., Inc., 57 Comp. Gen. 703 (1978), 78-2 CPD ¶ 117.

Our Office is charged with the responsibility of considering protests regarding federal agencies' conduct of procurements of goods or services, Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3552 (1988), and under this authority decides protests of federal agency procurements

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<sup>1</sup>The punch list was generated by the Coast Guard pursuant to the contract's inspection of construction clause, Federal Acquisition Regulation (FAR) § 52.246-12.

conducted for the account of contractors under the default clause of the previously awarded contracts. We determine if the reprocurement was conducted in accordance with applicable procurement standards and procedures. See Adaptive Concepts, Inc., B-243304, June 25, 1991, 91-1 CPD ¶ 605; TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. Procurements for the account of the contractor under the inspection clause are substantially similar to reprocurements under the default clause. See Titan Atl. Constr. Corp., B-200986, July 7, 1981, 81-2 CPD ¶ 12 (sustained pre-CICA protest of procurement issued under inspection clause). We therefore will consider the merits of the protests.

As indicated above, the Coast Guard elected to solicit only three on-site contractors to perform the punch list work and obtained bids from two firms. Tango and Neal both protest the agency's failure to solicit them for this work.

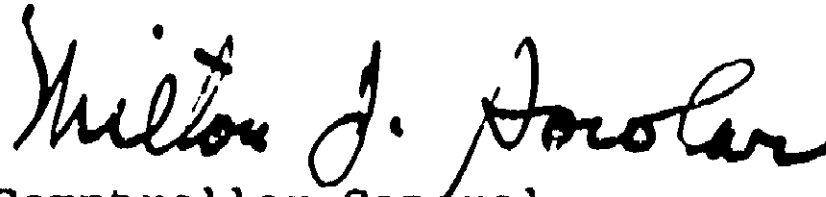
The Coast Guard reports that it repeatedly requested Neal to perform this work since the fall of 1990 and Neal has expressed no interest in completing this work "by either word or deed." The Coast Guard has submitted documentation to substantiate its position. In its comments on the report, Neal does not dispute the Coast Guard's statements in this regard, nor assert that it expressed interest to the Coast Guard in submitting a proposal on this work. Consequently, we deny Neal's protest.

The Coast Guard admits that Tango contacted the agency prior to the closing date for receipt of proposals for this work, and requested a solicitation and an opportunity to submit a bid for this work. The Coast Guard then determined that Tango should not be solicited because of its affiliation with Neal, for whose account the work was being procured. Specifically, the Coast Guard determined that Tango had an "organizational conflict of interest" under FAR § 9.501 since Tango's objectivity in performing the contract work on the protested solicitation would be impaired.

While it is true that an "organizational conflict of interest" is defined in FAR § 9.501 as including situations where a "person's objectivity in performing the contract work is or might be otherwise impaired" because of "relationships with other persons," we do not see how this regulation applies here. The "underlying principles" of organizational conflict of interest involve the prevention of "conflicting roles that might bias a contractor's judgment" and of a contractor's unfair competitive advantage. FAR § 9.505. This procurement is simply for construction work to be performed on a firm, fixed-price basis; it does not involve any situation where "objectivity" involving a contractor's judgment would be an issue.

Neither is it apparent why unfair competitive advantage should be a concern. As the Coast Guard has not elaborated as to why it has this concern about conflict of interest or otherwise justified its failure to allow Tango to compete, we sustain Tango's protest.

We recommend that the Coast Guard reopen the solicitation for the punch list work and permit Tango (or any other interested firm) to submit an offer. Under the circumstances, Tango is entitled to recover the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d).

*for*   
Comptroller General  
of the United States